

BEFORE THE ENVIRONMENTAL AND LAND USE HEARINGS BOARD
STATE OF WASHINGTON

FRIENDS OF GRAYS HARBOR and
WASHINGTON ENVIRONMENTAL
COUNCIL,

Appellants,

v.

CITY OF WESTPORT, MOX-CHEHALIS
LLC, PORT OF GRAYS HARBOR, and
STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondents.

ELUHB NO. 03-001

RECORD REVIEW
DECISION AND ORDER
(Concurrence and Dissent)

We concur with the majority opinion that the Links at Half Moon Bay project is subject to the City of Westport's Binding Site Plan approval process, and that as proposed, the hotels, conference center, and golf clubhouse meet the requirements in the Westport Shoreline Master Program (WSMP) and Shorelines Management Act (SMA) for a Shoreline Substantial Development Permit (SSDP). However, there is not substantial evidence supporting Westport's decision that the condominiums comply with the WSMP and SMA, and Westport erroneously interpreted and applied both the WSMP and SMA in approving the condominiums. For these reasons, we respectfully dissent from that portion of the majority decision. While condominiums are an appropriate component of the Links at Half Moon Bay project, they would comply with the WSMP and SMA only if located North of Jetty Access Road, near the other proposed structures.

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(1)

1 **ANALYSIS**

2 **[1]**

3 Westport concluded that the proposal meets the WSMP and SMA. The components of
4 the project subject to the SSDP are the hotels, conference center, golf clubhouse, and
5 condominiums. The record shows the following: The hotels, conference center, and golf
6 clubhouse would be sited north of Jetty Access Road, relatively close to the center of downtown
7 Westport, and away from beach areas that have experienced erosion in recent years. The
8 proposed condominium location is near the western terminus of Jetty Access Road, adjacent to
9 Half Moon Bay, the Pacific Ocean, and the entrance to Westhaven State Park. This area has
10 experienced erosion periodically in recent years. A total of 200 condominiums would be built in
11 eight five-story buildings, each approximately 62 feet tall. This area is currently undeveloped
12 except for the parking lot and bathroom that is part of Westhaven State Park. The shoreline is in
13 its natural condition, except for a walking trail that connects Westhaven State Park to Westport
14 Light State Park to the South. Westhaven State Park and Westport Light State Park are the most
15 visited coastal state parks in Washington State, and the area is Washington's most popular
16 surfing destination.

17 **[2]**

18 Westport's September 10, 2003 Staff Report (WSH 01495- 01520) on the SSDP and
19 Shoreline Conditional Use Permit (which relates to wetland fill for the golf course that is not at
20 issue in this part of the appeal), and the Westport Planning Commission's September 30, 2003

21 Findings of Fact, Conclusions of Law, and Order (WSH04394-04412), both concluded the

condominiums comply with the WSMP and SMP. On appeal to the Westport City Council, this conclusion was affirmed. (WSH 04452-04453). The Board's review of the SSDP is limited to the evidentiary record from the City of Westport's proceedings.

EROSION NEAR CONDOMINIUMS

[3]

The Planning Commission made findings of fact relating to erosion in the area of the condominiums. The Commission cited the opinion of Dr. Phillip Osborne, Pacific International Engineering scientist, who concluded, "it is unlikely that coastal erosion will impact the Links at Half Moon Bay project site in light of the responses already adopted or planned to respond to coastal erosion." (WSH04407). This testimony references historical erosion at the site, including a breach between the Pacific Ocean and Half Moon Bay adjacent to the area where condominiums would be built.

[4]

The majority opinion details the fact that after the Planning Commission decided that erosion would not impact the area and approved the SSDP in September 2003, a series of storms caused significant erosion along the Half Moon Bay shoreline. This resulted in the City adopting a "Proclamation of Emergency," and then building a seawall to protect Half Moon Bay and

1 adjacent structures from erosion. The seawall failed and a portion of the trail along Jetty Access
2 Road was lost to erosion.¹

3 [5]

4 In federal court proceedings on erosion control strategies, Dr. Philip Osborne, the City's
5 erosion expert, again testified on erosion issues. As of December 12, 2003, he stated "It is my
6 opinion that erosion is an imminent threat to the concrete public trail, asphalt road (including
7 jetty access road and points of access to the jetty), utility lines located in the roadway, the
8 parking lot, and the buildings containing bathrooms and changing rooms at Westhaven State
9 Park."² (BSP 231, 853)

10 [6]

11 Evidence on erosion occurring after the Planning Commission's process was obviously
12 not part of the Planning Commission record. Thus, Appellants sought to supplement the SSDP
13 before the City Council with the recent evidence of erosion, but the City Council denied the
14 motion to supplement the record. The appellants argue the City Council erred in failing to
15 consider new evidence regarding erosion and the City's own emergency declaration and actions.
16 Westport argues it had the discretion on whether to reopen the record to consider new evidence
17 on erosion. It is clear that the Westport City Council had the ability to consider new evidence on
18 erosion, even if such evidence was discovered after the Planning Commission hearing. See *East*

19 ¹ This information was available to the City Council at the time of the closed record review. FOGH offered the
20 material into evidence, but the Council refused to reopen or supplement the record with this new information. The
evidence was allowed into the record of the later binding site plan case.

21 ² The material in this paragraph was part of the record in the binding site plan case, but was not available to the City
Council at the time the SSDP was considered.

1 *Fork Rural Hills Association v. Clark County*, 92 Wn.App 838, 843-845 (1998). (While appeal
2 from Hearing Examiner to City Council is conducted on the record, consideration of “newly
3 discovered evidence” or remand to the Hearing Examiner may be appropriate.) The erosion that
4 occurred during October 2003 was directly relevant to a critical element of the City’s decision to
5 approve the shoreline permits, and the newly discovered evidence contradicted the evidence in
6 the Planning Commission’s decision.

7 [7]

8 Three months after the Westport City Council decided not to consider recent erosion
9 evidence, a witness on whom the City’s SSDP decision relied expressed a new and different
10 opinion on the risk of erosion near the proposed site of the condominiums. Compare Dr.
11 Osborne’s September 2003 Planning Commission testimony: “[I]t is unlikely that coastal
12 erosion will impact the Links at Half Moon Bay project site in light of the responses already
13 adopted or planned to respond to coastal erosion” with his December 2003 federal court
14 testimony: “erosion is an imminent threat.” Evidentiary decisions are reviewed under the
15 abuse of discretion standard. “An abuse of discretion is present only if there is a clear showing
16 that the exercise of discretion was manifestly unreasonable, based on untenable grounds, or
17 based on untenable reasons.” *Cobra Roofing Service, Inc. v. Department of Labor & Industries*,
18 122 Wn.App 402 (2004) citing *Moreman v. Butcher*, 126 Wash.2d 36, 40 (1995) [other cites
19 omitted]. This is a high standard, and the City of Westport correctly noted in argument that a
20 permitting agency cannot be required to pull back decisions already made whenever new
21 evidence arises.

1 [8]

2 In this case, however, administrative finality does not trump issues of public safety or
3 making a fully informed decision on the use of shorelines. In deciding that Westport abused its
4 discretion, we believe that it was unreasonable and untenable for Westport to authorize the
5 construction of 200 condominiums adjacent to an area where its own expert stated that “erosion
6 is an imminent threat.” The City of Westport added a condition to the SSDP stating:

7 Prior to the commencement of any construction, the applicant shall present to the City,
8 for review and approval, a plan to make known to future owners and residents within the
9 project that possible future coastal erosion could adversely impact their properties and
10 possessions. The applicant shall be required to record on titles and on condominiums
11 declarations a notice advising future owners of such erosion risk.

12 WSH 04411.

13 Warning prospective purchasers of erosion risks is not a sufficient substitute for
14 understanding erosion risks that affect public safety and significant private investment.

15 Westport and Mox Chehalis further argued that erosion is not an issue in the SSDP
16 because the project itself is not the cause of erosion. RCW 90.58.020 states that “it is the policy
17 of the state to provide for the management of the shorelines of the state by planning for and
18 fostering all reasonable and appropriate uses.” Erosion is highly relevant because a fundamental
19 question under the SMA is whether the proposed use is appropriate for the site. Were the errors
20 relating the erosion the only errors, a remand to consider erosion evidence would be appropriate.
21 However, the location of the condominiums violates the WSMP and SMA, so a remand in
unnecessary.

1 **COMPLIANCE WITH WESTPORT SHORELINE MASTER PROGRAM**

2 **[9]**

3 While condominiums are an appropriate element of this project, and are contemplated by
4 the TC zone and Master Plan, the proposed location for these condominiums is inconsistent with
5 the Shoreline Management Act and the Westport Shoreline Master Program. Under the
6 ELUHB statute, the City is entitled to such deference as is due the construction of a law by an
7 agency with expertise. RCW 43.21L.140(b). Thus, it is entitled to deference in interpretation
8 of its SMP, which it adopted and administers. We agree with the substantial deference given to
9 Westport in other parts of this appeal, including Westport's interpretation of the provision
10 authorizing fill of wetlands for public recreation needs, how Westport accepts dedications, and
11 how it will ensure compliance with the 200-foot setback from the marram grass line. However,
12 deference is not due when an interpretation or application of law is wrong.

13 **[10]**

14 The Westport SMP Shoreline Management Policies for Accreted Oceanfront Lands
15 states that “. . . in accreted oceanfront land areas, low-density development is compatible in
16 this area provided the wetland areas in the deflation plains are protected.” Westport
17 Comprehensive Plan, Chapter 9, page 42 (WSH01531). Even if the rest of the project site is
18 used to reduce the density calculation, the reality is that the construction of 200 condominiums
19 on a small available footprint, in an undeveloped area next to a state park will not appear as
20 low-density development. Westport's conclusion that the condominiums comply with the
21 policies for the Accreted Oceanfront Lands was in error.

1 [11]

2 The policies of the WSMP address residential development. They include policies such
3 as “Residential development should be designed with consideration given to shoreline protection
4 and aesthetic enhancement,” and “Infill within presently developed areas should be encouraged
5 in order to utilize existing utilities.” Westport Comprehensive Plan, Chapter 9, page 40.
6 (WSH01529.) The condominium portion of the Links project is not designed to emphasize
7 shoreline protection and it cannot be considered a form of aesthetic enhancement. The large
8 condominium structures in the midst of an otherwise natural area will be a significant aesthetic
9 impairment, completely changing the character of the Westhaven State Park area. While the
10 overall Links project provides some additional public access to the shorelines through trail and
11 path enhancements, the condominiums do not improve public access. The residential policies
12 encourage infill within presently developed areas. Unlike the hotels and conference center, the
13 proposed location is completely removed from any existing residential or commercial
14 development in the City of Westport. The SSDP decision fails to make findings regarding these
15 residential development policies and the entire record does not support the conclusion that these
16 policies are met.

17 Given the natural systems and residential policies of the Westport SMP, the SSDP
18 decision is incorrect in concluding the condominium proposal is consistent with the goals and
19 policies of the Shoreline Master Program and the Westport Comprehensive Plan.
20
21

1 **COMPLIANCE WITH SHORELINE MANAGEMENT ACT**

2 [12]

3 Under RCW 90.58.050, the SMA is described as a “cooperative program of shoreline
4 management between local government and the state.” Local governments implement the
5 regulatory portion of the SMA through local master programs, while Ecology’s has “primary
6 emphasis on insuring compliance with the policy and provisions of the SMA.” In 2000, Ecology
7 sent a letter to Westport stating that “The [policies of the SMA] will be used in our evaluation of
8 the merits of this proposal. It is incumbent on the applicant to demonstrate that these conditions
9 are met.” (BSP00399) Ecology’s letter also cites portions of the policies of the SMA contained
10 in RCW 90.58.020.

11 The legislature declares that the interest of all of the people shall be
12 paramount in the management of shorelines of statewide significance.
13 The department, in adopting guidelines for shorelines of statewide
14 significance, and local government, in developing master programs for
15 shorelines of statewide significance, shall give preference to uses in the
16 following order of preference which:

- 17 (1) Recognize and protect the statewide interest over local interest;
18 (2) Preserve the natural character of the shoreline;
19 (3) Result in long term over short-term benefit;
20 (4) Protect the resources and ecology of the shoreline;
21 (5) Increase public access to publicly owned areas of the shorelines;
(6) Increase recreational opportunities for the public in the shoreline;
(7) Provide for any other element as defined in RCW 90.58.100 deemed
appropriate or necessary.

(BSP00399); RCW 90.58.020.

1 [13]

2 Despite this, rather than defending the SSDP on the basis that the record supports the
3 conclusion that the condominiums meet the policies of the SMA, Mox Chehalis LLC and the
4 City of Westport argued that the project is not subject to the policies of the SMA. Even though it
5 had previously sent a letter stating that compliance with the policies of the SMA would be
6 required, Ecology did not take a position on this issue at hearing. The position of Mox Chehalis,
7 Westport, and Ecology are clearly inconsistent with the Westport's SMP, the SMA, Ecology's
8 SMA regulations, and numerous appellate decisions. RCW 90.58.140 states "A development
9 shall not be undertaken on the shorelines of the state unless it is consistent with the policy of this
10 chapter" The WSMP states "the city shall only grant an [SSDP] when the proposed
11 development is consistent with . . . the policies and procedures of the [SMA]." WMC
12 17.32.080(c)(1)(A).

13 A long line of leading appellate decisions on the SMA confirms that the policies of the
14 SMA do play a substantive role in shoreline permit consideration. See Bellevue Farm Owner's
15 Ass'n v. State of Washington, 100 Wn. App. 341, 350, 997 P. 2d 380 (2000), *Cowiche Canyon*
16 *Conservancy v. Bosley*, 118 Wn.2d 801, 821, 828 P.2d 549 (1992); *Batchelder v. City of Seattle*,
17 77 Wn.App. 154, 159, 890 P.2d 25 (1995); *Jefferson County v. Seattle Yacht Club*, 73 Wn.App.
18 576, 588, 870 P.2d 987 (1994). The ELUHB statute does not change the underlying permit
19 criteria in various local and state permitting schemes, it only authorizes a consolidated appeal of
20 those permit decisions. *Friends of Grays Harbor et al. v. City of Westport et al.*, ELUHB No.
21 03-001 (Order Denying Motion to Dismiss and Ruling on Scope of Record and Review.)

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Thus, it was an error of law for Westport and Mox Chehalis to argue that the policies of the SMA did not apply to the project. However, because the City's SSDP Staff Report and Planning Commission decision summarily concluded that the condominium portion of the project complied with the SMA, and the record includes evidence relevant to SMA considerations, it is necessary to review the decision under the Board's standards of review.

[14]

Westport's decision, however, did not analyze the SSDP under the policies of RCW 90.58.020. The Planning Commission decision contains six sections setting forth findings of fact: (1) Application/Background, (2) Shorelines Jurisdiction, (3) Project Description/Site Features, (4) Shoreline Master Program Requirements, (5) Wetland Issues, and (6) Coastal Erosion. There are no factual findings regarding compliance with the policies of RCW 90.58.020. Westport's decision reveals no analysis or consideration of the first three policies of RCW 90.58.020 pertaining to shorelines of statewide significance: "(1) Recognize and protect the statewide interest over local interest; (2) preserve the natural character of the shoreline; and (3) result in long term over short term benefit."

[15]

Though lacking in fact finding or analysis as to compliance with the policies of the SMA, the Planning Commission decision summarily concluded:

As conditioned, this proposal is consistent with the purposes of the Shoreline Management Act goals and policies as contained in RCW 90.58.020. The proposed resort hotel/conference center with associated condominiums and golf course preserves, to the greatest extent feasible, the public's opportunity to enjoy the physical and aesthetic qualities of

1 natural shorelines of the state consistent with the overall best interest of
2 the state and the people generally. As conditioned herein, the Links at
Half Moon Bay proposal is found to be consistent with the policies of
RCW 90.58.020.

3 The Planning Commission decision is deficient because there are insufficient factual
4 findings to support the legal conclusion that the project complies with RCW 90.58.020. The
5 City's Staff Report includes quotations of sections of RCW 90.58.020, but little analysis of how
6 those policies are met.

7 [16]

8 To the extent the City concluded the project was in compliance with RCW 90.58.020
9 without engaging in relevant fact-finding or analysis, the decision is not supported by substantial
10 evidence. Failure to have specific factual findings and legal conclusions addressing compliance
11 with the SMA in the final decision is not necessarily fatal to a decision, if the record supporting
12 the decision can provide the required analysis. However, a review of the entire record
13 demonstrates just the opposite. "The test of substantial evidence is whether evidence is
14 sufficient to persuade a fair-minded person of the truth of the declared premise. *Sparks v.*
15 *Douglas County*, 127 Wn.2d 901, 910 (1995). The record is replete with evidence on the
16 incompatibility of the proposed location of the condominiums with the state park, trail, and
17 public uses of the natural shoreline. While Westport's decision *concludes* that the
18 condominiums meet the policies of the SMA, there is not substantial evidence to support this
19 conclusion. In fact, the evidence in the record says otherwise.

1 [17]

2 The policies of RCW 90.58.020 include important concepts critical to evaluating a
3 proposal such as the Links at Half Moon Bay. In addition to the policies cited in Ecology's letter
4 to Westport, other policies emphasize the need to protect the public's enjoyment of the
5 shorelines of the state:

6 In the implementation of this policy the public's opportunity to enjoy the
7 physical and aesthetic qualities of natural shorelines of the state shall be
8 preserved to the greatest extent feasible consistent with the overall best
9 interest of the state and the people generally.

10 Despite this clear policy requiring preserving the physical and aesthetic quality of
11 shorelines, Westport's August 2003 EIS Addendum concluded " . . . matters of aesthetic taste are
12 qualitative and not regulated in the SMA." WSH 00911.

13 [18]

14 Westport's analysis of the condominiums' effect on users of the state park and the public
15 beaches appears to be limited to the fact that "the condominiums will be visible from Westhaven
16 State Park and the Westport Light Trail, as indicated in Exhibits A.22A and A.22E. [the
17 diagrams showing the size of the condos]. The condominiums are oriented so that they are
18 landward of the state park property and will not block views of either the Pacific Ocean or Half
19 Moon Bay." However, the proper consideration under the WSMP and SMA is not only whether
20 a proposal will simply block views from residences. WSMP states:

21 Shoreline uses and activities shall be designed and operated to avoid blocking, reducing,
or adversely interfering with the public's visual access to the water and shorelines.

WMC 17.32.060(4)(B).

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1 Westport's decision was limited to whether views would be blocked, not whether there
2 would be reduction or interference with the views of the water and shorelines. Evidence in the
3 record demonstrates the condominiums present a significant visual intrusion on the currently
4 unobstructed views from Jetty Access Road, Half Moon Bay, and the Lighthouse Park Trail.
5 The condominiums block a central portion of the vista, in contrast to the hotel/conference center,
6 which is located to the edge of the view in a more commercial area. The evidence further
7 reflects that the condominiums will be out of scale with other structures in the area. At the
8 present, the only structures are the single-story restroom/changing room facilities at Westhaven
9 State Park. In contrast, the proposed golf course will not add bulky or multi-story facilities in the
10 shoreline area.

11 The view analysis in the record shows that the five-story condominiums, however, will
12 loom over the parking area and appear to throw a shadow over some of the state park property
13 during parts of the year. Thus, Westport's decision is not supported by substantial evidence, and
14 is based on an erroneous application of the law to the facts.

15 [19]

16 Westport's analysis of shoreline recreation impacts is incorrect, in that it concludes the
17 project will benefit public recreation because the condominiums will bring people to the area to
18 use the public beach. Shoreline use by the occupants of privately-owned condominiums is only
19 part of the proper analysis. The part missing from Westport's decision is the impact the
20 development will have on existing recreational users of the shoreline. The evidence in the record
21 shows the condominiums at the proposed location will degrade other recreational use. (WSH

02007-02057). The golf course may encourage some recreation in the shoreline, but the condominiums will not add to the public's recreational opportunities in the shoreline. The condominiums are not dependent on their location on or use of the particular shoreline area, as is contemplated by the SMA policies governing alterations of the natural condition of the shoreline.

[20]

The application of the policies of the SMA to support reversing or modifying a permit decision is a relatively rare occurrence. In fact, we believe it is preferable to review a project based on more explicit development regulations, rather than on broader policy language. In *Allegra et al. v. Wright Hotels et al.*, SHB No. 99-08 & 99-09 (1999), the Shorelines Hearings Board applied the policies of the SMA and Seattle's SMP in remanding a decision to protect public views of the shoreline. Though part of the Board's decision was later reversed, the Board's application of the policies of the SMA to project level review remains valid. In this case, involving a Shoreline of Statewide Significance, and the most frequently visited Washington State Parks coastal facility in the state, the proposal simply does not comply with the SMA and it was error to conclude otherwise.

[21]

We believe it is appropriate for the City of Westport to authorize the use of this shoreline area for local economic development in the form of a golf course resort. However, this local interest must be balanced with the provisions in the WSMP and SMA to protect statewide interests embodied by Westhaven State Park, Westport Light State Park, and the natural shoreline of the Pacific Ocean and Half Moon Bay. Locating the condominiums upland,

1 alongside the other proposed structures, would provide the balance of shoreline uses required by
2 the WSMP and SMA, and would eliminate concerns about ongoing erosion.

3 Dated this 12th day of October 2005.

4 ENVIRONMENTAL AND LAND USE HEARINGS BOARD

5 BILL CLARKE, CHAIR

6 JUDY WILSON, MEMBER

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8 Phyllis K. Macleod
9 Administrative Appeals Judge
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